

NTSB Order No.
EM-61

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 6th day of July 1977.

OWEN W. SILER, Commandant, United States Coast Guard,

v.

JOHN B. ZOLEZZI, Jr. Appellant

Docket ME-55

OPINION AND ORDER

Appellant seeks reversal of the Commandant's decision affirming the probationary suspension of his fishing vessel master's license (No. 387428).¹ The sanction is predicated on appellant's plea of guilty to allegations that, while serving as master of the MARY ANTOINETTE, a fishing vessel over 200 gross tons, he had willfully employed unlicensed persons to perform mate's duties aboard the vessel from April 15 to May 16, 1975, during a fishing voyage on the high seas, in violation of 46 U.S.C. 224a.²

The Commandant's action followed appellant's appeal to him (Appeal No. 2044) from the initial decision of Administrative Law Judge H.J. Gardner.³ Although appellant acted pro se before the law judge, he has been represented by counsel on appeal.

After a reading of the charge and allegations by the law

¹The sanction was entered pursuant to 46 U.S.C. 239(g). This appeal therefrom is authorized by 49 U.S.C. 1903(a)(9)(B).

²46 U.S.C. 224a applies to all vessels documented under the laws of the United States, of 200 gross tons (with certain exceptions not pertinent herein) while "navigating on the high seas." Subsection (4) thereof provides that "No person shall be engaged to perform on board any [such] vessel...the duties of...mate...unless he holds a license to perform such duties...."

³Copies of the decisions of the Commandant and law judge are attached.

judge, appellant pleaded not guilty in the first instance. In the Coast Guard's opening statement which followed, its investigating officer summarized the matters intended to be proved, namely, that the vessel departed from San Diego on March 12, 1975, at the beginning of the voyage, with a full compliment of licensed officers; that the mate suffered a heart attack at sea on April 14 and was removed from the vessel at Acajutla, El Salvador; and that, being advised that the mate would be hospitalized for at least 3 weeks, appellant proceeded out to sea without a mate for the remainder of the voyage.

The Coast Guard requested the law judge to grant "a continuance in order to get statements from the crew which is now at sea" (Tr. 11). Instead, the law judge asked whether appellant agreed with the matters contained in the opening statement. Appellant replied affirmatively, and the law judge then asked why he was pleading not guilty. Appellant responded that he was unfamiliar with the law courts but thought it was best to plead not guilty. The law judge undertook to explain the requirements of 46 U.S.C. 224a and, after hearing appellant's explanation of the circumstances involved, asked whether he wished to change his plea. Appellant replied: "I am guilty under the law as it is written, but I am not guilty under the circumstances" (Tr. 13). The law judge then indicated that the circumstances would not excuse a violation under the statute and again asked whether appellant wished to change his plea. At this point, appellant stated "Well, I am guilty under the -- " (Tr. 14), which was accepted by the law judge.

Upon consideration of the record in this case, the Board concludes that the law judge improperly induced the appellant to plead guilty based on the facts alleged by the Coast Guard. Although neither side has raised this issue in its brief on appeal, we regard it as dispositive. Since appellant was not adequately advised on the law, we find that his plea was improvident and that reversal of the prior decisions is required.

In explaining the elements of the offense, the law judge confined himself to 46 U.S.C. 224a alone, stating that it is the master's duty regardless of mitigating circumstances "to make sure that the vessel is full compliance with the law" (Tr. 11-12). He made no reference to the further element of proof contained in the charge and specification that appellant had willfully violated this statute. The charge itself was brought under 46 U.S.C. 239(g), which makes a statutory violation such as the one charged in this

instance actionable only if it is committed willfully.⁴ Appellant was not advised that the Coast Guard has the burden of proving his willfulness in committing the offense, although he had protested his innocence of any knowing violation. Moreover, after his mate's heart attack at sea, he required to seek the nearest port, where even the law judge acknowledged that it would be "difficult ...[or]impossible" to obtain a licensed person as a replacement (Tr. 12). This statement of the law judge would virtually preclude a finding that appellant's noncompliance with section 224a was willful. Therefore, the guilty plea should not have been accepted.⁵

The precedent which governs this case is Commandant v. Neves.⁶ There, we held that a similar emergency negated the element of willfulness in a fishing vessel master's decision to continue a voyage on the high seas without a licensed person to perform as a mate. That decision goes against the automatic application of section 224a requirements, since the issue of whether there was a willful lack of compliance cannot be ignored.

The record before us does not indicate that appellant willfully proceeded on the voyage in violation of section 224a. The improbability of obtaining a licensed mate at the port of Acajutla was recognized by the law judge and the record contains no indication that the Coast Guard could have adduced proof to the contrary. Where, as here, the Coast Guard withdrew its request for a continuance in order to terminate the hearing after appellant's change of plea, we see no necessity to remand the case for a new hearing. The prior decisions are reversed.

ACCORDINGLY, IT IS ORDERED THAT:

1. The instant appeal is granted; and
2. The order of the Commandant affirming the law judge's order suspending appellant's master's license is vacated and set aside.

⁴Commandant v. Neves, Order EM-50, March 31, 1976.
Commandant v. Goulart, Order EM-25, 1 N.T.S.B. 2340 (1972).

⁵46 CFR 5.20-95(b) provides that if the presentation of mitigating circumstances is "inconsistent with a 'guilty' plea, the administrative law judge shall reject the plea, change the plea to 'not guilty' and proceed with the hearing."

⁶Footnote 4, supra.

TODD, Chairman, BAILEY, Vice Chairman, McADAMS, HOGUE, and HALEY, Members of the Board, concurred in the above opinion and order.